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No. 87-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. and W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

— VS. —

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners submit this brief in reply to respondent and to the United States and the American Bar Association as *amici curiae* for respondent.

SUMMARY OF THE ARGUMENT

By whatever approach to the act of state doctrine this Court adopts — by reasons of comity, separation of powers, choice of law or *stare decisis* — the result should be the same: Environmental Tectonics Corporation (hereinafter referred to as "ETC") cannot prove its allegations without intruding upon, and making determinations about, the validity of the sovereign action of the Federal Republic of Nigeria in awarding a military contract to W.S. Kirkpatrick & Co., International (hereinafter referred to as "Kirkpatrick").[1]

First, the official sovereign act at issue in this case is the award of the military contract, not, as respondent contends, the demand for or payment of a bribe. It is the review of that contract award which properly raises act of state concerns.

Second, the United States suggests for the first time in its *Amicus* Brief (hereinafter referred to as "U.S. Br."), despite a contrary statement in its Brief on the Petition for Writ of Certiorari (hereinafter referred to as "U.S. Pet. Br."), that this act is within the commercial exception to the act of state doctrine similar to the commercial exception recognized in the Foreign Sovereign Immunity Act. *Compare* U.S. Pet. Br. at 18, n. 13 *with* U.S. Br. at 26-28. However, the commercial exception, to the extent it may exist, does not apply to the award of contracts entered for the protection of national defense.

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[1] Further, any rulings made by the Court are likely to be based upon incomplete information since it is doubtful that the Nigerian government will cooperate with any discovery proceedings. *See* Brief for Petitioners at 32, n.31 (hereinafter referred to as "Pet. Br.").

Third, principles of international comity dictate application of the doctrine in this case and should not be narrowly circumscribed to avoid application as the United States suggests. U.S. Br. at 19-28. Further, despite contentions by respondent and the United States that countervailing policy considerations mandate rejection of the doctrine in this case, Brief for Respondent (hereinafter referred to as "Resp. Br.") at 17-22; U.S. Br. at 33-37, the regulatory aims of the Foreign Corrupt Practices Act (hereinafter referred to as "FCPA") are not hindered by denying private causes of action.

ARGUMENT

I

THE AWARD OF THE NIGERIAN MILITARY CONTRACT TO KIRKPATRICK IS AN ACT OF STATE

The threshold question in an act of state analysis is whether an official act of a foreign sovereign is at issue in the litigation. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694-95 (1976); Restatement (3d) of the Foreign Relations Law of the United States § 443, comment i (1987) (hereinafter referred to as "Restatement (3d)"). Respondent and the United States attempt to avoid application of the act of state doctrine by contending that the act of state or the "primary conduct at issue" in this case is the bribery and not the contract award and that bribery is not an act of state. Resp. Br. at 23-32; U.S. Br. at 21-23. However, this case involves the exercise of sovereign authority by the Nigerian government — the award by the government of a military contract. Pet. Br. at 28-29. The act of state doctrine mandates that our courts not review the validity of that award. If respondent is prohibited from challenging that award then the contract was proper and respondent has no claim.

Referring to the government's act as the acceptance of a bribe, Resp. Br. at 23-32, respondent argues that no act of state was involved in this action because bribery is not an exercise of sovereign power. Resp. Br. at 30. Respondent attempts to support this position by noting that bribes to officials are improper internationally and in the United States under the FCPA. Resp. Br. at 27-32. However, the basis of the invocation of the act of state doctrine is not the payment of a bribe but rather the award of the contract. Although the basis upon which the sovereign act is challenged is the payment of a bribe, and the bribery allegation itself has foreign policy implications because of the need to expose illegal conduct by high level Nigerian officials, it is the propriety of the award of the contract which is at issue in the case. Pet. Br. at 11-13; *see also* Opinion of the United States District Court for the District of New Jersey. (A. 298) For ETC to prove its case, the court must determine that but for the

payment of a bribe, ETC would have been awarded the contract and that the contract was improperly awarded by the Federal Republic of Nigeria to petitioners.[2]

Proceeding with its faulty analysis that the sovereign act at issue is the bribery, respondent contends that the act of bribery is a private act and not public in nature, citing *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) and *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963). Resp. Br. at 23-27. In those cases, the courts found that the unlawful accumulation of wealth by a head of state was not protected by the act of state doctrine where the acts were private and not taken on behalf of the foreign sovereign. In *Marcos*, the Second Circuit found that defendant Marcos had not met his burden to prove that his accumulation of wealth was the result of an act of state. 806 F.2d at 359. The acts, in that case, appeared to be private acts of looting by a government official. *Id.* at 348. However, the court suggested that if Marcos' wealth was acquired through "official expropriation decrees or public monopolizing" then an act of state issue would be raised. *Id.* at 359-60. The Fifth Circuit in *Jiminez* also reasoned that the embezzlement acts taken by Jiminez, the then president of Venezuela, were not acts of state of the Venezuelan government because the acts were taken "for the financial private benefit of [Jiminez]." 311 F.2d at 557-58.

These cases have no application to the facts of this case. Here, it is not disputed that the Nigerian government, in its official capacity, awarded the military contract to Kirkpatrick.[3] Further, although made aware of the allegations by counsel for

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[2] Under RICO, the plaintiff must allege and prove that he has "been injured in his business or property *by reason of* [a RICO] violation." 18 U.S.C. §1964(c) (emphasis added). *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-96 (1985) ("the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation").

[3] The contract itself is between Kirkpatrick and the "Minister of Defense, Ministry of Defense, Lagos, for and on behalf of the Government of the Federal Republic of Nigeria." (A. 81)

respondent (A. 124-126), the Nigerian government did not institute any action or take steps to invalidate the contract which was still in progress at the time. (A. 143 and 173) Nor did Nigeria reply to respondent's request that the government indicate its approval of this lawsuit. (A. 143 and 173) In sum, the Nigerian government ratified the award by fully performing under the contract.[4]

The United States takes a position similar to respondent's, asserting that the "primary conduct at issue" in this case is the bribery.[5] U.S. Br. at 21-22. The United States concludes that, because there is no conflict between American and Nigerian law regarding bribery, principles of comity are not offended. U.S. Br. at 21-22. However, this case does not raise the issue of whether the payment of a bribe is legal or illegal but rather whether the contract issued to Kirkpatrick is valid or invalid. That contract award is a sovereign act which cannot be questioned but must be accepted as valid by our courts. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 418 (1964), *citing Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918).[6]

Further, the United States contends that ETC's claims implicate the allegedly "corrupt *personal* motivations of individuals acting on behalf of the Nigerian Government, not the official purposes of the Nigerian Government, in awarding the contract." U.S. Br. at 39. (emphasis in original) However, ETC's claims cannot be adjudicated without implicating the Nigerian government's official award of the contract. It is impossible to

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[4] A foreign sovereign may later ratify its acts, thereby confirming that the act was a sovereign act. *See* Restatement (3d), Reporter's Note 3.

[5] However, the United States (as well as respondent) conveniently considers the 'act' to be the contract award for their respective discussions of the commercial exception. *See* Resp. Br. at 37-46; U.S. Br. at 26-28.

[6] Whether the act "comes under the act of state doctrine depends on the extent to which adjudication of the challenge would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government." Restatement (3d), comment c.

determine whether the Nigerian military contract properly belonged to respondent, a determination necessary to prove damages,[7] without determining that it was wrongfully awarded to Kirkpatrick. That is the very determination which the act of state prohibits and which, if it is to be reviewed, should be deferred to the Nigerian government.[8]

II

THE CONTRACT AWARD WAS A PUBLIC NOT A COMMERCIAL ACT

Respondent and the United States suggest that this Court should apply the commercial exception to the act of state doctrine as four justices did in *Alfred Dunhill of London, Inc. v. The Republic of China*, 425 U.S. 682, 706 (1976) (opinion of Justice White in which Rehnquist, Powell and Burger joined). *See* Resp. Br. at 37-46; U.S. Br. at 26-28. Petitioners, both courts below, and the Government in its petition brief but not in its *amicus* brief, have taken the position that the commercial exception, even if recognized, is not applicable to this case. Respondent, and the United States in its new position, assert that the 'act' was commercial and that this Court should adopt a broad commercial exception.

Petitioners suggest that the commercial nature of a foreign act should be only one of several factors considered rather than a mechanical test. There are fundamental differences between

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[7] *See infra* at p. 4, n.2.

[8] The Second Circuit makes this point in *Marcos*, 806 F.2d at 359-60, even though the property at issue in that action was in the United States whereas here the reasoning is more compelling because the contract was to be performed in Nigeria and was to be governed by Nigerian law. (A. 98) The American Bar Association ("ABA") in its *amicus* brief contends that the act of state doctrine is nothing more than a conflict of law rule. However, the ABA predicates its conclusion in this case that the act of state doctrine does not bar adjudication upon the faulty premise that the validity or legal effect of the contract is not at issue in this case. Brief *Amicus Curiae* of the American Bar Association at 20.

the doctrines of sovereign immunity and act of state which warrant different approaches. *See Dunhill*, 425 U.S. at 725-26 (Marshall, J., dissenting). Sovereign immunity exempts a foreign government from liability by virtue of its status, whereas the act of state doctrine precludes examination of the sovereign acts of a foreign government on the basis of comity and separation of power principles. *Id.* at 726, *citing Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Because the act of state doctrine is founded upon these latter concepts, a court should consider the underlying concerns regardless of the type of government activity involved. In the context of act of state concerns, a foreign government may engage in seemingly commercial activity which could trigger substantial foreign relations problems if adjudicated in American courts. For example, in *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), the labor union brought an action to enjoin the OPEC nations from continuing to violate antitrust laws through OPEC's price-setting procedures. The activity of the OPEC nations at issue was arguably commercial – the development and sale of oil are activities done by profit-seeking private enterprises. However, the Ninth Circuit found the action barred by act of state concerns because of "sensitive petro-politics." *Id.* at 1361.

Even if this Court were to adopt the commercial exception as advocated by the four Justices in *Dunhill*, this case does not present the type of "purely commercial operations" discussed in *Dunhill*, 425 U.S. at 695-706. The nature of this military contract is laden with public, political and national security considerations as evidenced by the list of officials involved in the procurement process – the president, air force officials, party officials, ministry officials and defense department personnel. (A.217 and 221) Further, the contract provided that Kirkpatrick would provide highly technical equipment and services to the Minister of Defense for use by the Nigerian Air Force which undeniably involved considerations of national security.

Moreover, an examination of the cases where commercial transactions are described in the context of sovereign immunity

analysis, a comparison which both respondent and the United States advocate, demonstrates that this Nigerian military contract is dissimilar from those commercial transactions. *See, e.g., Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574 (7th Cir. 1989) (contract to provide kidney transplants between Greece and a Chicago hospital deemed commercial); *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985) (sale of securities by Mexican bank is commercial); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (contract to supply cement to Nigeria was commercial); *Re Rio Grande Transport, Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981) (operation of a shipping company by foreign government deemed commercial). Unlike contracts with a foreign sovereign including with its military, to provide ordinary commercial goods, such as cement or boots or rice, this contract provided for furnishing of technical equipment to the Nigerian military as well as services, including training of Nigerian Air Force personnel. *See* Contract. (A. 81-117) As the United States observed about this contract in its petition brief, "the decision to award a military procurement contract, a decision that is often 'influenced by national security considerations' is a sufficiently 'official' expression of a state's 'public' interest to warrant application of the act of state doctrine." U.S. Pet. Br. at 18, n.13.

Moreover, even under the Foreign Sovereign Immunity Act, it is doubtful that this contract would be deemed to be "commercial activity."[9] Commercial activity is determined by reference to

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[9] The United States asserts that this contract would be regarded as "commercial activity" for purposes of the Foreign Sovereign Immunity Act, noting a statement in the legislative history which says that a contract to buy provisions for its armed forces would constitute a commercial activity. U.S. Br. at 27-28. However, the legislative history never suggests that all contracts with the military are commercial. It is the nature of the goods or services being provided which determines whether the transaction is deemed commercial. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong.

(*Footnote continued*)

the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. 28 U.S.C. § 1603(d). In looking at its nature, if the transaction is one ordinarily performed by private enterprise, or for profit, then it will be deemed commercial. *See* H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604; *see generally* Note, *The Foreign Sovereign Immunities Act: Defining Commercial Activity and Direct Effect Jurisdiction*, 25 Santa Clara L. Rev. 105, 108-14 (1985).

There is no doubt that "the essence or central elements of the agreement" made by the Nigerian government could not have been made by a private person. *See Millen Ind., Inc. v. Coordination Council For North American Affairs*, 855 F.2d 879, 884 (D.C. Cir. 1988); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) ("inquiry ordinarily focuses on whether the acts are those private persons ordinarily perform"). This contract involved highly technical equipment and training services for use by the Nigerian Air Force, and is not the type of contract into which private persons enter. The Nigerian government awarded this contract to obtain specific training equipment and skills for military personnel to further national security interests rather than to pursue a profit. Nigeria has the sole power to control and train its armed forces, and such training is a uniquely public or governmental activity. *See Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980) (contract between Saudi Arabia and United States to train Saudi's armed forces found governmental, not commercial, because the government "has sole control [over] its armed forces and proper training of those forces is an essential ingredient of that control").

& Admin. News 6604, 6614-15. The nature of this contract, to provide highly-technical equipment and training involving national security considerations is unlike a contract with which the armed forces would buy uniforms or shovels.

III

THIS LITIGATION OFFENDS NOTIONS OF COMITY AND DOES NOT ADVANCE AMERICAN POLICY OR ECONOMIC INTERESTS

Principles of international comity, which underlie the act of state doctrine, prohibit the kind of inquiry into Nigerian affairs required by this litigation.[10] Although the United States recognizes that issues of comity apply to this case, it contends that countervailing American policy interests in the enforcement of our own laws should prevail over the deference which might otherwise be accorded to a foreign sovereign under principles of comity. U.S. Br. at 19-21. The United States also unduly narrows the scope of comity under the doctrine as well as the scope of the factual findings required for respondent to prevail in this matter. Thus, the United States reaches the erroneous conclusion that comity does not require application of the doctrine to this case.

First, respondent and the United States argue that the regulatory considerations set forth in the FCPA override act of state concerns in this case. Resp. Br at 27-32; U.S. Br. at 33-37. However, the FCPA has been enforced in this case by the United States and the statute does not provide for private remedies. *See* Pet. Br. at 23-26. Recognizing that no private right of action exists under the FCPA,[11] the United States contends that its interest in enforcing the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et. seq.*, creates a policy of overriding concern here.[12] U.S. Br. at 36-37 and 20-21. However, RICO is a catch-all provision like conspiracy which,

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[10] *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 780-796 (1972) (Brennan, J., dissenting) (discussion, *inter alia*, of the political question doctrine and principles of comity as part of the act of state analysis). U.S. Br. at 35-36.

[11] U.S. Br. at 35-36.

[12] Nothing in either the FCPA or RICO indicates any congressional intent to override the act of state doctrine in enforcement of these statutes.

outside of its originally intended purpose to stop organized crime, has no ... aggressionally expressed policy relevant to this action. Therefore its use in this action can only be said to enforce the policy behind the FCPA which the Government concedes was not intended to be enforced by private parties. U.S. Br. at 35-36. Thus, no particular regulatory need is filled by refusing application of the act of state doctrine to this case. Once it is recognized that no countervailing policy considerations exist which would require the courts to limit the application of comity to this case or to circumscribe evidentiary matters in an effort to permit adjudication, the Government's arguments for those restrictions lose considerable force.

By contending that no challenge is made to the contract award, both respondent and the United States manage to avoid the most difficult act of state issue in this case. Respondent emphasizes that "this case does not address the validity *vel non* of the Kirkpatrick-Nigeria contract," Resp. Br. at 24, n.16, and that the validity of no governmental action is in question because the litigation does not seek to rescind the commercial contract nor to obtain compensation from Nigeria itself. Resp. Br. at 33, n.25. The United States, noting that the action was not brought against the Nigerian government, contends that "the courts below would not be required to adjudicate the validity of an act of the Nigerian Government." U.S. Br. at 23. The Government then concludes that "the contract will retain whatever effect it otherwise has as a matter of *Nigerian law*, and that effect presumably will continue to be recognized in the United States." U.S. Br. at 25. (emphasis in original) However, it is impossible to reconcile the dual contentions of the Government that the Nigerian contract will be recognized in the United States and that a United States court should be permitted to find that the contract was improperly awarded to Kirkpatrick and should have been awarded to respondent. Whether or not the Nigerian government is a party, the lawful effect of the contract is plainly *the* issue in the case.[13]

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[13] If the position of the United States and respondent hinges upon the dual facts that the Nigerian government is not a party to the suit and that the

(*Footnote continued*)

To support its view that the act of state doctrine is inapplicable here, the United States argues for a limited scope of comity as it relates to the act of state doctrine. At the same time, however, it raises the specter of concern for "other aspects of international comity" stating that it expresses "no view on whether other aspects of international comity that are distinct from those informing the act of state doctrine - *e.g.* principles of comity concerning the production of evidence in Nigeria or pertaining to the affairs of its Government - may properly be invoked in further proceedings in this case." U.S. Br. at 25, n.25. While some commentators have urged that principles of comity make the act of state doctrine superfluous,[14] the two should at least be recognized as co-extensive.[15] Whether or not evidence relating to the affairs of the Nigerian government can or should be gathered and judged in this case is a problem properly addressed by the act of state doctrine and should not be left for another day.

At the same time that the United States urges that evidentiary problems, although raising issues of comity, are beyond act of state concerns, the United States suggests an unworkable standard of proof which is presumably intended to avoid any intrusion upon Nigeria's internal decision-making processes. The government asserts that the issue of causation can be determined by "identifying the intended and foreseeable consequences" of Kirkpatrick's conduct and thus "would be addressed only to determine the domestic consequences of petitioners' conduct." U.S. Br. at 23-24. However, respondent's damage claim cannot be predicated upon such proof but must be based upon proof of actual injury which in this case would be proof that

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contract is "recognized" in the United States, a party would presumably be precluded from obtaining injunctive relief sought at the commencement of the contract.

[14] *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa.L.Rev. 325, 389-92 (1986) (arguing that principles of comity are covered within the political question doctrine).

[15] The dichotomy has been invoked by some courts to avoid potentially difficult decisions. *See, e.g., Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979) and *Williams* v. *Curtiss-Wright Corp.*, 694 F.2d 300, 305 (3d Cir. 1982).

respondent would have been awarded the contract but for Kirkpatrick's conduct. Thus the issue cannot be limited to "domestic consequences" but necessarily involves detailed inquiry into the Nigerian government's procurement award processes and speculation of the chain of events in this case absent the bribery.[16] And, while there may be international consensus regarding bribery, there is no such consensus about how, much less whether it is proper, to review the decision-making processes of a sovereign. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). It would be wiser to abstain from adjudicating this case based upon principles of comity underlying the act of state doctrine than to call upon American courts to change substantive law — in the form of evidence required to prove damages — to avoid intrusion upon the decisions of a foreign nation as the Government's position would require. U.S. Br. at 23.

Finally, the effect of this case upon international commerce should not be ignored. *See* Brief of the Republic of China as *Amicus Curiae* for Petitioner. Both American businessmen and the foreign governments with whom they contract rely on the validity of their contracts.[17] If this Court allows American courts to scrutinize these sovereign decisions, contracting with American companies will pose the added risk to a foreign government that American courts will become the arbiters of the foreign sovereign's internal political affairs.[18] In addition to the litigation which may arise from every disappointed bidder, if this court opens the door for American courts to examine the motivations and policy judgments of foreign sovereigns, any change in a foreign nation's administration or government may provide a basis for a sovereign to challenge the official acts of the preceding regime in American courts.

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[16] The United States never directly addresses the proof required for respondent to prove damages in this case.

[17] *See* Dellapenna, *Deciphering the Act of State Doctrine*, 35 Vill. L. Rev. __ (1989) (to be published in November) (noting in support of the act of state doctrine that parties rely on the finality of the acts of foreign states).

[18] As respondent notes, no other country has legislation analogous to the FCPA. Resp. Br. at 30, n.19.

CONCLUSION

For all of the above reasons, and for the arguments set forth in Petitioners' Brief, this Court should find respondent's claims barred by the act of state doctrine.

Respectfully submitted,

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